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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

ATHENA CIELEN,
Petitioner,

vs.

AETNA LIFE INSURANCE COMPANY, a Corporation, and
THE TRAVELERS INSURANCE COMPANY,
a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

**To the Appellate Court of the State of Illinois,
First Judicial District.**

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PETITION FOR WRIT OF CERTIORARI

**To the Appellate Court of the State of Illinois,
First Judicial District.**

The petitioner, Athena Cielen, prays that a Writ of Certiorari be issued to review the judgment of the Illinois Appellate Court, First District, made final by the denial by the Illinois Supreme Court, on January 9, 1968, of petitioner's Motion for reconsideration of the Order of the Illinois Supreme Court, denying Petition for Leave to Appeal.

OPINION BELOW.

The Opinion of the Illinois Appellate Court, First District, is reported in full in 81 Ill. App. 2d 22, 229 N. E. 2d 571. It is printed herein as Appendix "A".

No Opinion was rendered by the Illinois Supreme Court. No reason was given (Appendices "C" and "D").

DOCUMENTS AND PAPERS TRANSMITTED WITH PETITION.

1. Certified Transcript of Record on Appeal.

2. Certified Transcript of Appellate Court Record.

3. Certified copy of Opinion rendered by the Illinois Appellate Court, First District (Appendix "A").

4. Certified copy of Mandate of the Illinois Appellate Court, First District (Appendix "B").

5. Certified copy of Order entered in the Illinois Supreme Court, denying petitioner's Petition for Leave to Appeal (Appendix "C").

6. Certified copy of Order entered in the Illinois Supreme Court, denying petitioner's Motion for reconsideration of the Order denying Petition for Leave to Appeal (Appendix "D").

JURISDICTION.

The judgment and Opinion of the Appellate Court of Illinois, First District, were entered August 2nd, 1967 (Appendices "A", "B", infra). The Illinois Supreme Court denied petitioner's timely Petition for Leave to Appeal, November 28, 1967 (Appendix "C", infra). The Illinois Supreme Court on January 9, 1968, denied petitioner's timely Motion for reconsideration of the Order

denying the Petition for Leave to Appeal (Appendix "D", infra). This made final the judgment of the Illinois Appellate Court, First District, and left no further appellate remedy under the laws of the State of Illinois.

The petitioner therefore invokes the jurisdiction of this Court under 28 U. S. C. A., Section 1257(3).

QUESTIONS PRESENTED.

1. Whether the State courts denied to petitioner Due Process and the Equal Protection of the established rules of law applicable for accidental death benefits, by holding that petitioner had the burden to prove, not only the accident, but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise.

2. Whether the State courts denied to petitioner Due Process and the Equal Protection of the Laws by receiving in evidence the copy of the Coroner's certificate of death, which contains hearsay statements as to the immediate cause of death, and which said statements were not made by a treating physician or by any physician whatsoever; and said certificate of death showing on its face that no autopsy was performed; and showing that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court.

3. Whether the State Courts denied to petitioner Due Process and the Equal Protection of the Laws, by allowing the jury to decide the issue of liability based upon the language of Certificates of Group Life Insurance upon which this action was filed, there being no issue of fact regarding said Certificates.

CONSTITUTIONAL PROVISIONS INVOLVED.

A.) Amendment XIV to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B.) Article VI, of the Constitution of the United States, Second Clause:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE.

The petitioner brought suit in the Circuit Court of Cook County, Illinois, to recover double indemnity for accidental death benefit on certain group insurance policies issued by the respondents on the life of petitioner's husband, Theodore S. Cielen, an employee of Commonwealth Edison Company (Rec. 3-6). The claim for double indemnity arose out of a boat accident which occurred on June 9, 1963 when the decedent was in a small row boat with the petitioner, his wife, and their two-year old daughter. A power boat operated by teenagers twice sideswiped the boat

which the deceased was operating causing it to capsize and its occupants were thrown in the water. When the deceased was pulled out of the water an attempt was made to give artificial respiration but he did not revive and was pronounced dead by a local doctor who was called to the scene. The petitioner, as the widow of the decedent, requested that an autopsy be performed but said request was not complied with and without consent of the petitioner the body was delivered to a mortician to be prepared for burial. (Rec. 138-147).

The petitioner accepted the ordinary death benefits under the group policies and demanded the accidental death benefits payable thereunder (Rec. 157; Rec. 4, par. 7; Rec. 6, par. 15). When respondents refused payment, this action was filed to recover such benefits (Rec. 3-6).

Trial was had before a court and jury. The petitioner, as plaintiff, proved the facts surrounding the accident to establish a prima facie case to recover the accidental death benefits (Rec. 138-147).

The trial court judge received in evidence, over petitioner's objection, the copy of Coroner's certificate of death which contains hearsay statements as to the immediate cause of death, which said statements were not made by any physician whatsoever; and showing on its face that no autopsy was performed; and showing that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court (Rec. 58, Exh. 1; Rec. 175-176; Rec. 98, par. 10).

The respondents, as defendants, offered medical testimony that the deceased had a history of a heart disease (Rec. 231-243).

By its instructions to the jury, the trial court judge imposed upon petitioner, as plaintiff, the burden of prov-

ing that death was not caused or contributed to by disease (Rec. 73-74; Rec. 97, pars. 7, 9), and refused to instruct the jury that respondents, as defendants, had the burden on this issue because it was an affirmative defense (Rec. 78; Rec. 97, par. 8).

The verdict and judgment were entered for the defendants below, the respondents here (Rec. 92).

The Appellate Court affirmed the trial court decision holding that the burden of proof was on the petitioner, plaintiff below, not only to prove the accident, but to offer clear and convincing evidence eliminating all possible other causes of death, whether from disease or otherwise (Appendix "A", infra). On Petition for Leave to Appeal, the Supreme Court of Illinois, denied the same. No opinion was rendered and no reason was given (Appendix "C", infra). Petitioner's Motion for reconsideration of the order denying Petition for Leave to Appeal was denied by the Illinois Supreme Court. No opinion was rendered and no reason was given (Appendix "D", infra).

Both the trial court and the Appellate Court and the Supreme Court of Illinois, erred in refusing to carry out the correct principles of law in this case, and denied to petitioner Due Process and the Equal Protection of the established rules of law applicable for accidental death benefits.

REASONS FOR GRANTING THE WRIT.

I.

It is respectfully suggested that the multitude of causes, in both the Federal and State Courts, involving the questions presented in this Petition, should prompt the Supreme Court of the United States to enunciate its authoritative pronouncements by granting this Petition.

For example, see Annotations in 84 A. L. R. 2d 176-317, 131 A. L. R. 240-269.

". . . The purpose of the insurance contract would be gravely thwarted if the clause with which we are concerned were read to exclude coverage for any loss except that resulting solely and exclusively from accidental injury, without any other contributing cause. The policy must be construed in the light of the reasonable expectation and purpose of the ordinary man when making an ordinary contract. In the words of Dean Roscoe Pound, 'The law enforces reasonable expectations arising out of conduct, relations and situations.' See Introduction to the Philosophy of Law, page 189. The view that an insurer may escape liability, when there is interplay between a pre-existing illness and an accidental injury and 'but-for' each there would not have been the resulting liability is not acceptable to this court." Carlson v. New York Life Insurance Company, 76 Ill. App. 2d 187, at 196, 222 N. E. 2d 363, at 368.

In Scanlan v. Metropolitan Life Ins. Co. (7 Cir., 1937), 93 F. 2d 942, at 946, the Court stated:

> "One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which

did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded (Citations)."

The rule of law quoted from the Scanlan case was adopted in Rebenstorf v. Metropolitan Life Ins. Co., 299 Ill. App. 71, on pages 84 and 85, 19 N. E. 2d 420, on pages 425 and 426. It is the Illinois Rule of Law, notwithstanding the Opinion and Decision of the Illinois Appellate Court, First District, in petitioner's case (Appendix "A" infra), which discriminatorily avoids and evades the above quoted well established Rule of Law in Illinois, which is also the majority Rule.

In Preston v. Aetna Life Ins. Co. (7 Cir., 1949), 174 F. 2d 10, at page 16 (Cert. den. 338 U. S. 829, 70 S. Ct. 80, 94 L. Ed. 504), the Court said:

"We believe that the weight of authority throughout the country supports the rule announced in the Rebenstorf, Scanlan and Nelson cases and are justified, we think, in concluding that the Supreme Court of Illinois would hold with the majority rule."

See also, Manufacturers' Accident Indemnity Co. v. Durgan, 7 C. C. A. 581, 58 Fed. 945.

"The definition of 'accident', generally assented to, is an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances is unusual, and not expected to the person to whom it happens." McGlinchy v. Fidelity and Casualty Co., 14 Atl. 13, 14, 80 Me. 251, 6 Am. St. Rep. 190 (1888).

In petitioner's case, the deceased was in a small row boat with the petitioner, his wife, and their two-year old daughter. A power boat operated by teen-agers twice sideswiped the boat which the decedent was operating, causing it to capsize and its occupants were thrown in

the water. When the decedent was pulled out of the water an attempt was made to give artificial respiration, but he did not revive and was pronounced dead by a local doctor who was called to the scene (Rec. 138-147).

It has been held that "violence" within double indemnity provision of life policy covering death, affected through violent means, means any degree of force whatever. Lincoln National Life Ins. Co. v. Erickson (C. C. A. Minn. 1930), 42 F. 2d 997.

In the case of McGlinchy v. Fidelity and Casualty Co., 14 Atl. 13 at page 16, 80 Me. 251, above cited, the Court held that the subsidiary conditional clause in the policy providing that the insurance did not extend to any bodily injury of which there shall be no external or visible sign upon the body of the insured, did not apply to fatal injuries. The Court said:

> "This does not apply to fatal injuries, but only to those not resulting in death. It would be utterly unjust if this condition applied in cases of death. It would preclude recovery in all instances where death occurs by drowning, freezing, poisoning, suffocation, concussion—means of death leaving no outward mark—and also where the insured has been killed, and his body is missing."

And the Court further said (p. 16):

> "The dead body is external and visible sign enough that an injury was received."

II.

The petitioner was discriminatorily deprived of procedural Due Process of Law, and was denied the Equal Protection of the Laws, by the State court's Decision (App. "A", infra), holding that petitioner had the burden to prove, not only the accident, but to offer clear and

convincing evidence eliminating all possible other causes of death, whether from disease or otherwise. Such an impossible burden of proof upon the beneficiaries of life insurance policies with double indemnity provisions in all sudden deaths which occur in traumatic circumstances, will thwart the purpose of such life insurance policies. Moreover, it will cause and encourage mischief, misunderstanding, thereby establishing a legalistic pattern of injustices in the field of life insurance pertaining to double indemnity benefits for accidental death.

"In cases involving accident policies or other policies with accident features containing express conditions or exceptions excluding or limiting the coverage of the policy as to an injury or death which would otherwise be within such coverage * * * the burden of proving that the insured's injury or death was within such conditions or exceptions is on the insurer, and * * * the plaintiff is not under any burden of negativing application of such exceptions or conditions." 142 A. L. R. 742, 746 (1943).

The Rule of Law quoted above is so well settled that it requires no citation.

Mr. Justice Cardozo, in Silverstein v. Metropolitan Life Ins. Co., 254 N. Y. 81, at 85-86, 171 N. E. 914, at 915 (1930), stated that "the infinite interplay of causes makes it impossible to segregate any single cause as operative at any time and place to the exclusion of all others, if cause is to be viewed as a concept of science or philosophy." **Additional authorities:** Leverich v. Mutual Life Insurance Company of New York (U. S. D. C., E. D. Ill.), 139 F. Supp. 862; Sparkman v. Highway Ins. Co., 266 F. Supp. 197 (D. C. La. 1967); Letz v. World Ins. Co., 336 Ill. App. 489, 495, 496, 84 N. E. 2d 678; Scanlan v. Metropolitan Life Ins. Co., 93 F. 2d 942 (7 Cir. 1937); Preston v. Aetna Life Ins. Co., 174 F. 2d 10 (7 Cir. 1949, cert. den., 338 U. S. 829, 70 S. Ct. 80, 94 L. Ed. 504); Wolen v.

Metropolitan Life Ins. Co., 287 Ill. App. 415, 420, 421, 5 N. E. 2d 249; Dietz v. Metropolitan Life Ins. Co., 305 Ill. App. 507, 514, 27 N. E. 2d 540; Rogers v. Prudential Ins. Co., 270 Ill. App. 515, 525.

III.

The State court, over petitioner's objection, allowed in evidence the copy of the Coroner's certificate of death which contains hearsay statements as to the immediate cause of death, which were not made by a treating physician or by any physician whatsoever. Such certificate shows on its face that no autopsy was performed, and that it was prepared one day after the date of death, upon information furnished to the County Coroner by a third party not before the Court. (Rec. 58, Exh. 1; Rec. 175-176; Rec. 98, par. 10).

There was no dispute in petitioner's case regarding the fact of the death of her husband, the assured. (Rec. 3, par. 7; Rec. 5; par. 15; Rec. 157.)

In Dortch v. New York Life Insurance Company, 268 F. 2d 149 (8 Cir., 1959), the question of the admissibility of the Coroner's death certificate under an Arkansas statute, substantially similar to the Illinois statute in this regard, was considered. The Court held that the death certificate was not admissible, and at page 156, said:

"It is significant to note that the statute in question provides that the certificate or copy thereof shall be prima facie evidence of the facts therein stated. The issue of whether the death was suicidal or accidental is not a fact within the meaning of the statute. See New York Life Ins. Co. v. Anderson, 8 Cir. 1933, 66 F. 2d 705, 706. Inasmuch as all of the facts contained in the death certificate were admitted or not in dispute, and the sole

and only purpose of the offer was to get before the Jury the Coroner's personal opinion that the death was caused by suicide, we find there was no impropriety and no prejudice to the defendant in sustaining objections to the offer. The certificate was inadmissible for the purpose for which it was offered."

In Rausch v. Underwriters at Lloyds of London, 320 F. 2d 525 (C. A. Wash. 1963), it was held that the court properly excluded the Coroner's certificate that the cause of Insured's death was drowning, as being opinion or conclusion of the Coroner.

In Ziolkowski v. Continental Casualty Co., 263 Ill. App. 31, at pages 42-43, the Court said:

> "* * * that while the statute provided that such a certificate shall be prima facie evidence of the facts therein stated, it does not make such a certificate prima facie evidence of mere conclusions based upon hearsay; that 'it will be readily perceived that such a construction of the statute would lead to most dangerous and hazardous consequences.'"

And the Court further said (p. 45):

> "* * * it is the duty of the Courts to guard the rights of litigants when certificates of death are offered in evidence, lest they become 'a mere trap or device for the purpose of catching the unwary,' and when statements not authorized by the act are incorporated in a certificate, they must be treated as surplusage and excluded. * * *."

Additional authorities: Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 526, 34 N. E. 2d 732; Plano Foundry Co. v. Industrial Commission, 356 Ill. 186, 193, 190 N. E. 255.

It is plain and obvious that the State court's allowance into evidence of the Coroner's death certificate was an

indirect way of placing before the Jury hearsay and unproven statements which were inadmissible, thereby depriving the petitioner of procedural Due and Orderly Process of Law and denying to petitioner the Equal Protection of the Laws.

IV.

The State court, over petitioner's objection, admitted in evidence the copies of certificates of Group Life Insurance, issued to petitioner's husband, the assured, and allowed the jury to decide the issue of liability based upon the language of such certificates, although there was no issue of fact regarding said certificates (Rec. 58, Exhibits 9 and 10; Rec. 260, 261, 262). The respondents, as defendants, had admitted that Theodore S. Cielen, petitioner's husband, was covered by the provisions of said certificates of Group Life Insurance (Rec. 25-26; Rec. 29-31).

The State Court had no authority to impose upon the jury to decide an issue of law. It is generally known that the court decides issues of law, and the jury decides issues of fact. The interpretation of the language of the certificates of the Group Life Insurance was for the trial judge and not for the jury. Treolo v. Auto Ins. Underwriters, 348 Ill. 93, 95-96, 180 N. E. 575 (Citing authority).

It has been held that it is proper to reject and exclude evidence regarding a matter about which there is no controversy. Duggan v. Ryan, 211 Ill. 133, 136, 71 N. E. 848; Jenkins v. Hollingsworth & Tabor, 83 Ill. App. 139, 141.

The decision of the Illinois Appellate Court, First District (App. "A", infra), ruling that the petitioner had the burden to prove, not only the accident, but to offer clear and convincing evidence eliminating all other possible causes of death, whether from disease or otherwise, conflicts with the well established rule of law in both Federal and State jurisdictions, and contravenes and nullifies the

Due Process, Equal Protection, and privileges and immunities Clauses of Section One, Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.